United Nations

AT

Administrative Tribunal

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31 July 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 869

Case No. 962: SILVEIRA-CROTTY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Ms. Deborah Taylor Ashford, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas at the request of Celine Silveira-Crotty, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, 31 August, and 30 November 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 25 November 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended until 31 March 1997, the time-limit for the filing of a corrected application with the Tribunal;

Whereas, on 31 March 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"...

(b) [To order the Secretary-General to:]

[i] Implement Administrative Tribunal Judgements #458 and 497, Silveira, as Applicant continues to suffer harassment, prejudice and discrimination in the Office of Legal Affairs,

... [ii] Grant Applicant a post and compensation at the G-7 level ascribed to the post she encumbered retroactive from 1988 together with her seniority in grade and in the Organization,

(d) [To] find that the Respondent has made libellous and unfounded comments on Applicant's character and to award Applicant compensation accordingly,

(e) [To] grant Applicant compensation for the actions of the Administration incompatible with her rights,

(f) [To] grant Applicant compensation for having to unnecessarily pursue the time-consuming, demoralizing and costly appeals procedures through the Administrative Tribunal,

(g) [To] grant Applicant compensation for the suffering and humiliation inflicted upon her; for the moral wrongs; and for the violation of her rights to fair and equitable treatment in general, and for full and fair consideration for career development and promotion in particular.

..."

Whereas the Respondent filed his answer on 15 July 1997;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 11 September 1972, on a fixed-term appointment as a Clerk Stenographer (E) at the G-3 level, in the Office of Public Information. On 21 December 1972, the Applicant was transferred to the Department of

Economic and Social Affairs. She served on a series of fixed-term appointments until 21 July 1973, when she was granted a probationary appointment. On 1 September 1974, she was granted a permanent appointment. On 14 March 1977, the Applicant was transferred to the International Trade Law Branch of the Office of Legal Affairs (OLA). On 1 April 1977, the Applicant was promoted to the G-4 level. The Applicant has since worked for OLA, in different sections of the Office. On 28 November 1988, she was assigned to the Treaty Section of OLA, where she continues to work.

On 16 November 1988, the Applicant requested the Secretary-General to review the administrative decision to submit her "fact sheet," which contained a reference to the rebuttal of her performance report, to different departments and offices, in order that they consider her for possible assignment. She also requested review of the decisions ordering her to report for duty in OLA and charging her absence to annual leave.

On 5 April 1989, the Applicant requested the Secretary-General to review the administrative decision of 15 December 1988, to withhold 17 days pay from her January 1989 pay check, and the decision to deny her sick leave for her "job-related anxiety/stress disorder". The JAB consolidated both appeals and adopted its report on 1 August 1989.

On 1 September 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined her case in the light of the JAB's report and had decided to maintain the contested decisions. He also noted the JAB's unanimous recommendation that "a fresh effort be made by both the Administration and the appellant to find a solution to this case".

In its Judgement No. 458, Silveira, rendered on 7 November 1989, the Administrative Tribunal noted that it was "satisfied that [the appraisal of the Rebuttal Panel's report] was made with due care and was not affected by prejudice, sexual harassment, improper motive or other irregularity". (Cf. para. IX) The Tribunal agreed with the recommendation made by the JAB that the Administration continue to make every effort to transfer the Applicant outside OLA.

On 30 November 1989, the Applicant filed an appeal to the Tribunal contesting the Respondent's adoption of the JAB's conclusions and recommendations, in which the JAB found frivolous the Applicant's appeal against the decisions, inter alia, that she report for duty at OLA and that her "fact sheet" be circulated. On 21 March 1990, the Applicant filed a second appeal with the Tribunal seeking revision of Judgement No. 458, Silveira. The Tribunal ordered joinder of the two appeals. On 8 November 1990, the Tribunal rendered Judgement No. 497, Silveira on the two appeals, upholding the decisions of the Respondent and rejecting the applications in their entirety. The Tribunal reiterated "its hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued". (Cf. para. XVI)

On 4 and 7 December 1989, the Assistant Secretary-General for Human Resources Management, informed the Applicant that her post in the Treaty Section was to be abolished by 31 December 1989, and that her name would be placed on a list of staff to receive priority consideration for placement in another post. On 13 May 1991, the Respondent offered the Applicant an agreed termination package with a substantially increased termination indemnity. On 23 May 1991, the Applicant refused the Respondent's offer. According to the Applicant's personnel file, the Respondent continued to make numerous attempts to place the Applicant outside OLA. None of these attempts was successful. On 5 March 1992, the Applicant was informed that she would be reassigned, effective 9 March 1992, within the Treaty Section, from the Publications Unit to the Depositary Functions Group. She protested the decision to reassign her, and on 30 March 1992, requested administrative review of the decision. On 6 May 1992, she was informed by the Director of Staff Administration and Training Division, Office of Human Resources and Management, that the decision to reassign her was being withdrawn.

On 17 June 1993, the Applicant instituted a recourse before the Appointment and Promotion Panel in connection with her non-inclusion in the 1993 G-7 Promotion Register, but was unsuccessful.

On 5 January 1994, the Applicant requested the Secretary-General to review the Administration's failure to implement the Administrative Tribunal's Judgements 458 and 497. On 4 February 1994, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1993 G-7 Promotion Register.

On 11 April 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 16 November 1995. Its considerations, conclusions and recommendations, read, in part, as follows:

"Considerations

...

139. The Panel noted the numerous and continuous efforts by the Administration to accommodate the Appellant by transferring or reassigning her from the OLA. The Panel considered the genuineness of these efforts, as well as the Appellant's rejection of certain offers and opportunities she deemed unsatisfactory.

140. The Panel unanimously agreed that the efforts by the Administration to abide by the Tribunal's decisions had been genuine attempts to find a solution and had been pursued persistently and exhaustingly.

141. The Panel further considered the Appellant's contention that she was denied a promotion to the GS-7 level in the Office of Legal Affairs in spite of 'her higher and specialized academic qualifications, very good performance at the G-7 level, with complete loyalty to the Organization, and her twenty-one years of service in various Departments, including 17 years in OLA itself.'

...

143. The Panel has recognized that staff members have the right to be considered for promotion on the basis of objective considerations free from bias and discrimination. However, in this case, the Panel noted that the Appellant did not allege that her lack of promotion to the GS-7 level was vitiated by improper procedures or motives. The Panel does not have the authority to assess the substantive merits of any staff member's request for promotion or to compare them with those of his or her colleagues who were promoted.

144. With regard to the Appellant's complaint that the Respondent failed to grant her a special post allowance to the GS-7 level from December 1988 to March 1992, the Panel notes staff rule No. 103.11(a) and 103.11(b) which state that the granting of a special post allowance is discretionary with the Secretary-General.

145. With regard to the Appellant's expanded pleas, ... the Panel notes that it is improper to remove or insert documents in any staff member's file without his or her consent. Furthermore, any staff member is entitled to examine his or her own files and ask for the removal of material improperly inserted or the inclusion of material improperly excluded.

Conclusions and Recommendations

146. On the basis of the aforesaid considerations, the Panel concluded that the Appellant failed to show convincingly that her 'rights' as a U.N. staff member had been violated. Reasonable efforts by the Administration to implement the Tribunal's recommendations were undertaken and, on occasion, thwarted by the Appellant herself. Based on this conclusion, the Panel does not recommend awarding the Appellant any compensation.

147. The Panel, therefore, decided to recommend that no action be taken on the appeal."

On 20 November 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her, inter alia, as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has noted the Board's conclusions that you failed to show convincingly

that your rights as a U.N. staff member had been violated. It found further that reasonable efforts by the Administration to implement the Tribunal's recommendations were undertaken and, on occasion, thwarted by you and does not recommend awarding you any compensation. In accordance with the Board's recommendation, the Secretary-General has decided to take no further action on your case."

On 31 March 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent has failed to implement Administrative Tribunal Judgements Nos. 458 and 497, having failed to place the Applicant in a post outside OLA.

2. The Respondent should have included her name in the 1993 G-7 Promotion Register, in view of the fact that she has been at the G-4 level for 20 years and that she has been filling a post that should have been classified at the G-7 level.

3. The Applicant is entitled to a post with substantive functions.

Whereas the Respondent's principal contentions are:

1. The record clearly shows the Respondent has dedicated an exceptional amount of time and resources trying to reassign or transfer the Applicant from OLA, thus implementing Administrative Tribunal Judgements Nos. 458 and 497.

2. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-promotion.

3. The Applicant has no entitlement to a special post allowance at the GS-7 level, and the conditions for granting such a special post allowance were not met.

The Tribunal, having deliberated from 2 to 31 July 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General of the United Nations dated 20 November 1995, accepting the Joint Appeals Board's (JAB) conclusions that the Applicant "failed to show convincingly that her 'rights' as a United Nations staff member had been violated" and that "reasonable efforts ... to implement the Tribunal's recommendations" had been undertaken by the Administration. (Cf. Judgements No. 458, Silveira (1989) and No. 497, Silveira (1990)).

II. In her application, the Applicant argues that the Respondent failed to implement Judgements No. 458, Silveira and No. 497, Silveira, as he did not make every genuine effort to implement in good faith the recommendation of the Tribunal that she be transferred to a post outside the Office of Legal Affairs (OLA); that the Respondent failed to promote her to the GS-7 level, especially in the light of the fact that none of her colleagues have her seniority or qualifications; that she had not been assigned substantive functions for over 3 years; and that the Respondent failed to grant her a special post allowance (SPA) to the GS-7 level from December 1988 to March 1992.

The Applicant requests the Tribunal to order the implementation of Judgements Nos. 458 and 497; to grant her a post and compensation at the GS-7 level; to find that the Respondent has made libellous and unfounded comments on her character; and to grant her compensation for various violations of her rights, and for moral suffering.

III. On 7 November 1989, the Tribunal rendered Judgement No. 458, Silveira, rejecting all of the Applicant's pleas. At the same time, the Tribunal expressed trust that efforts to

transfer the Applicant out of OLA "will be vigorously pursued". One year later, in Judgement No. 497, Silveira, dated 8 November 1990, the Tribunal once again accepted the JAB's conclusions that the Applicant's appeal was frivolous and reiterated its "hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued." It appears from the Applicant's submissions that she considered the Tribunal's pronouncements as constituting an order that the Respondent reassign the Applicant. This is not so.

IV. The Tribunal notes from the record that the Respondent undertook persistent efforts and expended an exceptional amount of time and resources in order to reassign the Applicant from OLA, or alternatively, to find another solution for the situation, but those efforts were unsuccessful. It appears that the Respondent undertook approximately 50 administrative actions and approached no less than 20 different offices in an effort to resolve the Applicant's situation. A certain number of these offers of reassignments were rejected by the Applicant whereas others were not pursued due to the impossibility of finding a department willing to accept the Applicant.

V. Having reviewed the record, the Tribunal can only arrive at the conclusion reached by the JAB in its thorough report that the Respondent's efforts were made in good faith. This is reflected not only in the number of attempts made to reassign the Applicant, but also in the earnest tone of OLA's repeated requests for the Applicant's transfer from the department. No bias was shown to exist in the Respondent's efforts.

VI. Regarding the Applicant's submission that she be granted a post at the GS-7 level, the Tribunal has consistently held that staff members have no right to be selected for a

particular post or promotion. Although the Tribunal agrees that every qualified staff member has a right to be fairly considered for a promotion, the staff member has no right or legal expectancy to a promotion. In Judgement No. 134, Fürst (1969), the Tribunal held that "[a]ppointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same." This is consistent with staff regulation 1.2, which provides, inter alia:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations."

Accordingly, the Tribunal agrees with the JAB finding that the Applicant was considered for promotion in accordance with established administrative procedures and therefore, that her non-promotion did not violate her rights, and did not demonstrate any bias by the Administration. The Respondent showed good faith in implementing the prior judgements of the Tribunal.

VII. The Applicant contends that she was performing functions at the GS-7 level and therefore was entitled to an SPA at that level. The Tribunal notes that staff rule 103.11(a) provides that:

> "Staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts."

Staff rule 103.11(b) provides, inter alia, that:

> "... a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months may, in exceptional cases, be granted a non-pensionable special post allowance from the beginning of the fourth month of service at the higher level."

VIII. The Tribunal has had to pronounce itself on this issue on many occasions. It has held that the granting of an SPA is within the discretion of the Secretary-General (Judgement No. 275, Vassiliou (1981)) and that there is no obligation on the part of the Administration to grant an SPA to every individual who might be regarded as possibly falling within the terms of staff rule 103.11(b) (Judgement No. 342, Gomez (1985)). Moreover, according to personnel directive PD/1/84/Rev.1, the SPA is not normally payable at more than one level higher than that of the staff member's grade, except when a staff member in the General Service category is granted an SPA to the Professional category. The Tribunal concludes that, even if the Applicant's claim of performing functions at the GS-7 level were correct, she would have no right to an SPA in accordance with the criteria set out in PD/1/84/Rev.1. In any event, the Applicant has not satisfied the Tribunal that she is performing functions other than those of her post, at the GS-4 level.

IX. The Tribunal notes that this is the third appearance of the Applicant before the Tribunal. The Applicant may be reminded that the principle of res judicata is recognized by the Tribunal. The JAB erred in allowing the Applicant to raise issues that the Tribunal had previously decided in its Judgements Nos. 458 and 497.

X. For the foregoing reasons, the Tribunal finds:

1. That the Administration properly implemented Administrative Tribunal Judgements Nos. 458, Silveira and 497, Silveira;

2. That the Applicant's rights were not violated when she was not promoted from the GS-4 to the GS-7 level; and

3. That not granting the Applicant an SPA did not violate her rights.

XI. Accordingly, the application is rejected in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Deborah Taylor ASHFORD
Second Vice-President

Victor YENYI OLUNGU
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary